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No. 21

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In the

Supreme Court of the United States

October Term, 1964.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Defendant-Appellant,

vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District of Wisconsin.

PETITION FOR REHEARING.

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IN THE

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OCTOBER TERM, 1964.

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vs.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY,

Plaintiffs-Appellees.

On Appeal From The United States District Court For The Eastern District of Wisconsin.

PETITION FOR REHEARING.

Now comes the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Lake Superior and Ishpeming Railroad Company, Appellees herein, and respectfully pray the Court to grant a rehearing in this cause.

I.

The Court's Judgment, Based on the Texas Case, that Republic Junction Is an "Extension" of a Line of Railroad Conflicts With Its Order in No. 857 (O. T. 1964) Denying Review of a Decision that the Texas Doctrine Does Not Apply to Railroad Operations into New Territory Over a New Track Which Divert Traffic From Another Railroad.

After hearing argument on the merits in this cause, the Court without opinion entered its *per curiam*, one sentence

judgment reversing the decision of the three-Judge court below (R. 384, 393). The Court supported its judgment by citing *Texas & Pac. Ry. Co.* v. *Gulf, Etc., Ry.*, 270 U. S. 266, 278 (1926), which held that new or proposed "spur, industrial, team, switching or side tracks", although normally exempt under § 1(22) of the Interstate Commerce Act[1] from the requirements of § 1(18) of the Act,[2] nevertheless could constitute an "extension of a line of railroad" requiring the Commission's § 1(18) approval in the event such new trackage enabled a railroad to institute service in a "new territory" and thereby to divert traffic from other railroads already serving the area. The import of this citation is that the 262 foot Republic Junction connection between the adjacent lines of the Milwaukee and Ishpeming is an extension of their respective railroads because it permits them to operate into territories not theretofore served by them and to divert traffic from Appellant, Chicago and North Western Railway, thus, in the sense of the *Texas* case, enabling Appellees to "invade" areas already served by the North Western.

We cannot reconcile this judgment with the Court's order in *New York Central Railroad Co.* v. *Southern Railway Co.*, No. 887, this Term, entered March 29, 1965, only a week before the judgment in this case. In that case the Court denied a petition for a writ of certiorari and thereby let stand the decision of the Court of Appeals, 338 F.2d 667 (C. A. 7, 1964), affirming *per curiam* the opinion of the District Court, 226 F. Supp. 463 (N. D. Ill., 1964), that the Southern Railway's operation over a new 10.5 mile track to a coal mine located only 350 feet from a branch line of the New York Central was not a § 1(18) extension

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[1] Sec. 402 of the Transportation Act of Feb. 28, 1920, c. 91, 41 Stat. 477, 49 U. S. C. § 1 (22).

[2] *Ibid.*, 41 Stat. 477, 49 U. S. C. §1(18), as amended.

of railroad line and did not "invade" territory previously served by the Central. The Southern theretofore had not served the locale of the mine. On the contrary, as the Commission observed in 1938 when it granted the Central a § 1(18) certificate to construct its branch line, no railroad other than the Central served the territory. *Cleveland, C., C. & St. L. Ry. Co. Construction & Operation*, 228 I.C.C. 461, 462 (1938).

The Central relied principally on the *Texas* decision to support its right to an injunction under § 1(20) of the Act, 226 F. Supp. 467-468. But the district court, at pages 473-474, rejected the very theory which underlies the Court's judgment in this case.

Because of its insignificant length and the switching operations conducted over it, Republic Junction would be within § 1(22) of the Act and exempt from the Commission's § 1(18) power to regulate, except for the Court's interpretation of the *Texas* decision. The Court's adjudication suggests in this litigation that the *Texas* rule applies only because the connection permits Appellees to divert traffic from another railroad by their entry thereover into new territory. But the result in No. 887 is wholly contrary to that reached herein in that diversion of traffic from another railroad was there held not to come within the *Texas* doctrine despite the fact that the Southern's undertaking constituted a significant incursion into new territory, which Republic Junction does not.

In this case a short track goes nowhere and the Court calls it an "extension of a line of railroad"; but in No. 887 a much longer track goes to an important shipper and is held to be exempt from § 1(18). The logic of this anomaly escapes us. The result in each case is more appropriate to the track in the other.

The law should not be ambiguous on this point, and these conflicting applications of the *Texas* case should not remain unresolved, in view of the importance to the nation's railroads and rail shippers of a consistent interpretation of §§ 1(18)-1(22) of the Interstate Commerce Act. Spur, industrial, team and switching tracks for picking up and delivering rail cars to shippers and for interchanging them between railroads are essential to the furnishing of adequate railroad transportation to the public. As Congress recognized by enacting § 1(22), every railroad must routinely construct new tracks of such types, and add to and rearrange old, in order to keep pace with the new and changing requirements of the shipping public.

The Milwaukee, for example, during 1964 initiated 103 different projects to build such tracks. No less than 17 of them involved service to a shipper already served, or to be served, by another railroad as well as by the Milwaukee.[2] In at least those 17 projects, and in many of the others also, the Milwaukee's improved or new facilities may uniquely benefit a shipper so that his traffic is attracted to the Milwaukee in preference to another carrier. Many of the 103 projects are designed to serve new shippers never before served by the Milwaukee or, perhaps, by any railroad. Counsel has no reason to believe the other 140 Class I railroads of the Country annually build proportionally fewer such tracks.

Any construction of such necessary trackage could easily run afoul the rule of the *Texas* decision and subject both shippers and railroads to the uncertainties, delay and expense of seeking administrative approval of projects whose legality, otherwise, is made doubtful by the

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[2] This data is from records in the office of the Milwaukee's Auditor of Capital Expenditure authorizing funds for the construction of such trackage.

presently ill-defined scope of the terms "new territory" and diversion of traffic by means of "invasion". At a time when the future vitality of the Nation's railroad systems depends upon new traffic from new shippers and improved facilities to serve old shippers, the Court should leave no uncertainty in the law as to whether, without Commission approval, every track construction to serve a new shipper or every diversion of traffic from existing carriers is proscribed by the *Texas* case.

II.

Contrary to the Court's Judgment Herein, the Texas Case Cannot Apply to Republic Junction Because the Track Permits No Service to New Territory or New Shippers, and It Causes No Traffic Diversion From Other Carriers Which Would Not Have Occurred in the Absence of the Connection.

The facts in this litigation make clear that in the vicinity of Republic Junction the connection causes nothing which the *Texas* case condemns in the absence of Commission approval. The 262 foot track itself cannot extend into new territory because it lies entirely within the adjoining rights of way of the Milwaukee and Ishpeming (R. 99, 385). No shipper can be served directly from it (Applicants' Ex. 3; R. 228, 114, 389). Nor can the connecting track "invade" any territory served by the North Western or Soo Line whose tracks nearest Republic Junction are 9 and 6 miles, respectively, away from it (Applicants' Ex. 2, R. 226, 114). No traffic originates in the immediate area of the connection, as occurred in *Texas & Pac. Ry.* v. *Gulf. Etc., Ry.*, 270 U. S. 266, 276 (1926). The track makes possible only a new through route, no coordination or merger of Appellees' operations.

The connection enables neither the Milwaukee nor the Ishpeming to extend their railroads into new territory

not previously served by them (R. 101). The record shows that the traffic over Republic Junction consisted preponderantly of saw logs and chemical wood moving from Sunrise Landing to Amasa and Iron Mountain, Michigan (R. 299-301). The Milwaukee has served these destination cities, and its right of way has been at what is now Republic Junction, since it commenced serving the Upper Peninsula many years ago (R. 300, 301, 390, 400). These products have not moved via the connection to any shipper who did not receive them before Republic Junction was built (R. 101).

The Ishpeming has operated its railroad in the area of Republic Junction since it commenced serving the town of Republic two miles south of the connection (R. 259-262). It is the only railroad ever to serve Sunrise Landing (R. 391); the North Western and Soo Line do not operate to that point. Its branch line was built there to meet the demand of newly instituted logging operations (R. 301) and with the § 1(18) authorization of the Commission. *Lake Superior & Ishpeming Railroad Company Construction*, 295 I. C. C. 812 (1956).[4] When the connection was built, Sunrise Landing was not "new territory" for the Ishpeming.

This litigation ought not turn, therefore, upon the *Texas* case ruling that a railroad track constructed into new territory is within the ambit § 1(18) of the Interstate Commerce Act so as to require Commission approval of the undertaking. On this ground the Court's judgment in this cause does not comport with the facts of record herein.

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[4] The decision of the Commission is not reported in full here. It was entered in Finance Docket 19084.

It is true, however, that prior to Republic Junction, lumber products moved from origins on the Ishpeming to Amasa and Iron Mountain via the present Soo Line in conjunction with the Milwaukee or via the North Western (R. 301, 389). But prior to the Ishpeming's extension to Sunrise Landing, those origins did not include Sunrise Landing. Traffic cannot be "diverted" from a carrier which has never moved it.

Any diversion of traffic from Sunrise Landing purportedly caused by the connection similarly would have occurred if the tracks had never been built. The record is emphatic that the rail transportation costs via the present Soo Line and the North Western would have been prohibitively high (R. 126-130) and that the lumber products from Sunrise Landing would have moved by motor truck in preference to any rail route in the absence of Republic Junction (R. 128-129, 156-157, 173). Inevitably without the connection, the traffic would have been diverted from both the North Western and Soo Line, but to motor trucks instead of to Appellees' railroads. Appellant and the Soo Line thus would now be no better off without Republic Junction than with it. Either way, they would have lost the traffic.

This is markedly different from the diversion through invasion situation adjudicated in the *Texas* case. Republic Junction does not permit either the Milwaukee or the Ishpeming to divert traffic from other railroads or to invade their territory within the rule of that decision. The *Texas* case cannot accord with the facts here in issue, and the Court should decline to be guided by it in this litigation.

III.

CONCLUSION.

For the foregoing reasons this Petition for Rehearing should be granted, and this case should be set down for reargument.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, one of the attorneys for Appellees in this cause, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Frank M. Long

CERTIFICATE OF SERVICE.

I do hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof properly addressed with postage prepaid by first-class mail to each such party.

Dated at Chicago, Illinois, this 19th day of April, 1965.

Frank M. Long